Volume 28 · AUGUST, 1944 · Number 2

Journal *of the* American Judicature Society

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CARL B. RIX

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TWO RECENT EXAMPLES

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Ann Arbor, Michigan

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JOURNAL OF THE AMERICAN JUDICATURE SOCIETY

Volume 28 AUGUST, 1944 Number 2

If Then the Walls Seem Toppling

CARL B. RIX

THE TITLE IS from the Code of Hammurabi, King of Babylonia, Twenty-third Century B. C.—"If a builder build a house for someone, even though he has not yet completed it, if then the walls seem toppling, the builder must make the walls solid from his own means."

We have built our structure of justice on the common law, the decisions of courts for the inalienable rights of men, on governments of laws and not of men, on suppression of tyranny. The common law has always protected the individual. Freedom in government has always followed the common law. Throughout the British Commonwealth, in the United States, and wherever English speaking men have carried their influence, the structures of justice have followed the design of the common law.

Now men of the English tongue are in all parts of the earth, fighting, building, administering justice in occupied countries. After the war their influence will be more widely spread than ever. Nearly all of the shipping of the world, nearly all of the commercial planes, bases and air routes, will be operated and owned by them. Dean Wigmore has said:

"As was said by the English attorney general for the Board of Trade, in 1720, 'Let the Englishman go where he will, he carries with him as much of law and liberty as the nature of things will bear.'

"And so, in the future too, if we make a regional survey, we may expect that wherever there are Englishmen and wherever there are North Americans, either as the body of the population or as a dominant political class, there we shall find more or less of the Anglican common law; there, but not elsewhere."

Dean Pound has said:

"England has never dictated laws to the world. But England, too, has been able to bind peoples in unity of law through the might of the spirit. For it is the spirit of English law of the seventeenth century, the spirit of its taught tradition, the spirit of its technique of decision, the frame of mind behind its conceptions of the relation of government and governed, and its doctrines as to adjudication and administration, shaping experience of the exigencies of diverse

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climes and mixed peoples of diverse stocks, which has enabled English law to divide the world not unequally with the Roman law."

We and countless men before us are the builders of our structure of justice. You will recall the quotation from Justice Holmes:

"When I hear that one of the builders has ceased his toil, I do not ask what statue he has placed upon some conspicuous pedestal, but I think of the mighty whole and say to myself, he has done his part to help."

Now the termites of absolutism, of state socialism, of inflexible codes of administrative bodies, threaten to topple the walls of the structure in the countries of its origin just when the world has its greatest opportunity to accept the design. Now the cardinal principle of the common law, *stare decisis*, has been so impaired that the members of the courts argue with each other as to the effect of their decisions. The walls of our structures extend to every section of our country, into every court house, every legislative hall, every state and municipal structure. The walls of the courts are no stronger than those of the legislative halls, of the state and municipal buildings. They are totally dependent on each other for support.

The doctrine of contribution is an established principle of law. Every lawyer must contribute of his own means; the task cannot be left to the few. Surveys must be made of the structure, constant vigilance must be exercised to assure against decay, a force of eager workmen must be recruited, leadership must be provided. If we preserve our structure here, we preserve it in the world. If we make it stronger here, we encourage people of other lands to adopt our design. The great chance is at hand. Will we make the walls solid from our own means?

The lawyers of our country have an expanding horizon of opportunity. As individuals they can and will exercise increasing devotion and activity in national, state, and local government. Collectively they can and will work to greater effectiveness in organizations, the American Bar Association, the American Judicature Society, the American Law Institute, their state and local bar associations. They can and will work for good government, for constitutional government, for solvent governments, for higher standards of justice, here and in the world. They will make their contribution in the field of international law. They will contribute lastingly from their own means to make the walls solid as the lawgiver of fifty-four hundred years ago decreed.

Kipling in "The Heritage" said for us:

"Our Fathers in a wondrous age
Ere yet the earth was small,
Ensured to us an heritage,
And doubted not at all
That we, the children of their heart,
Which then did beat so high,
In later time should play like part
For our posterity.

"Then, fretful, murmur not they gave
So great a charge to keep,
Nor dream that awestruck Time shall save
Their labor while we sleep.
Dear-bought and clear, a thousand year
Our fathers' title runs.
Make we likewise their sacrifice,
Defrauding not our sons."

No legal system can long survive, in the sense of commanding public respect and confidence, which does not comport with the people's shrewd, native sense of justice. Nor should it survive. The law is not a game; it is an arbitral process. It will never be perfect, because it is human. But the striving for that goal is part of the destiny of our profession.—*Justice William O. Douglas.*

The truth is always the strongest argument.—*Sophocles.*

Annual Meeting to Be Held in Chicago September 13

The 1944 annual meeting of the American Judicature Society will be held in Parlor C of the Drake Hotel, Chicago, Wednesday noon, September 13. As in other recent years, President David A. Simmons will preside at the general meeting, and Chairman of the Board George E. Brand at a separate meeting of the Board of Directors for the election of officers. The program will include an address by Federal Judge Merrill E. Otis of Kansas City.

The meeting will be held at luncheon, and because of food rationing it is necessary to have more definite information than ever before as to the number to be served. Officers and directors will receive direct mail notices with enclosed post cards on which to make their reservations. Because of wartime travel conditions no effort is being made to urge the general membership to attend the meeting, but those who will be there at the time will be welcome and may vote in the election of directors for the coming year. Members who expect to attend the annual meeting must notify the Ann Arbor office of their intention to do so well in advance, in order that reservations may be made for them.

A.B.A. Convention Program

The annual meeting is scheduled to occur during the annual meeting of the American Bar Association, and much of the program of that convention will be of interest to students of judicial administration. Attention is especially called to a demonstration of pre-trial procedure to be conducted by the Section of Judicial Administration and the Special Committee on Improving the Administration of Justice, at 10:00 a.m., Tuesday, September 12. Four judges, two federal and two state, each of whom has had outstanding success with pre-trial, will participate in the demonstration. They are Judge Alfred P. Murrah, of the United States Circuit Court of Appeals for the Tenth Circuit; Judge Joseph A. Moynihan, Presiding Circuit Judge of Michigan; Judge Bolitha J. Laws, of the United States District Court for the District of Columbia; and Judge Harry M. Fisher of the Circuit Court of Cook County, Illinois. Judge Orie L. Phillips, chairman of the Section of Judicial Administration, will preside, and at the close of the demonstration Professor Edson R. Sunderland of the University of Michigan will comment on the methods used, followed by general discussion.

Other items of interest on the American Bar Association program include:

Addresses on business administration of state courts, by Chief Justice Robert G. Simmons of Nebraska; improvement in traffic courts, by Judge Earle W. Frost of Kansas City; improvement in justice of the peace courts, by Chief Justice Phil S. Gibson of California, and others, at the meeting of the Section of Judicial Administration at 2:00 p.m., Monday, September 11.

A discussion of the work of state and local bar associations during the past year, as disclosed by applications for the award of merit, by James C. Dezendorf of Portland, Oregon; an address on the work of state bar secretaries, by a speaker to be announced; and the report of the Committee to Promote Public Interest in Government, by Lloyd Wright, all in the Section of Bar Activities, at 9:45 a.m., Tuesday, September 12.

A meeting of metropolitan trial court judges, under the auspices of the Special Committee on Improving the Administration of Justice, for discussion of problems of judicial administration with which those courts are particularly concerned, at 10:00 a.m., and 2:00 p.m., Wednesday, September 13.

Addresses by Arthur T. Vanderbilt, G. Aaron Youngquist and Murray Seasongood, members of the Supreme Court Advisory Committee on Rules of Criminal Procedure, discussing the second draft of the Committee's proposed rules, at the meeting of the Section of Criminal Law, at 10:00 a.m., Tuesday, September 12.

A general discussion of all phases of the traffic courts conference program by leaders of the movement in the bar and in associated organizations, at the meeting of the Section of Judicial Administration at 2:00 p.m., Tuesday, September 12.

Why Do Judges Hesitate?

This might well be called a pre-trial number of the JOURNAL, by virtue of the two lead-

ing articles on that subject published herein. Both are products of the committee on pre-trial procedure of the Judicial Conference of Senior Circuit Judges, the origin and work of which is explained in Mr. Shafroth's article on page 39.

Surely it must occur to some readers as they peruse these and other recent articles to wonder why it should be necessary to carry on a campaign for the wider use of such an obviously simple and beneficial device. The natural reaction of the layman to pre-trial would seem to be, "Why, of course! Why haven't you been doing that all the time?" In the automobile industry, if one company develops an improved method that makes possible the completion of a certain operation at a saving of time and money, while at the same time improving the product, the stern authority of the Patent Office and the watchfulness of the company's legal staff are barely able to restrain the other companies from adopting it forthwith.

There is practically no competition among courts, and no advantage in a monopoly of improvements, while there are on the contrary most compelling public and private reasons for the circulation and exchange of such ideas. Is it possible that hostility to innovations, a secret unwillingness to blow the other fellow's horn, or a general allergy to other people's ideas has ever stood in the way of a sincere test of pre-trial in any American court?

One of the most valuable parts of the discussion of pre-trial here presented is the large portion of Mr. Shafroth's article dealing with settlement of cases. That is a subject on which a great deal needs to be said.

It is, of course, obvious that a judge has no business warning one of the parties that he has a weak case and had better settle, or indulging in any threat or coercion of any kind to make unwilling litigants choose settlement rather than trial. Such procedure will not only ruin the pre-trial conference but impair the position and influence of the judge in the trial itself. It is apparent as can be that the whole subject of settlement is one that needs to be dealt with most tactfully and delicately by the pre-trial judge.

Too many discussions of settlement in pre-trial conferences have unfortunately ended right there. That is not the whole story. Although courts are set up to try cases, the settled case is normally better disposed of than it could possibly be by trial. When judgment is rendered at the end of a trial there is one satisfied and one disappointed party, and there may be an appeal. When a case is settled there are, by the very nature of the process of settlement, two satisfied parties, and there is never an appeal. Is not that a most desirable outcome, worthy of the strongest possible encouragement by all legitimate means?

It may safely be said that thousands of cases have worried through a long and bitter trial that might have been settled out of court if there had been some way by which the subject of settlement could have been brought up without risk to the pride or dignity of either party. If the initiative is not left to either party but is assumed by the pre-trial judge, and if it is made a regular part of every pre-trial conference so that it never casts any reflection one way or the other on the merits of a particular case, the stage is set for a maximum use of the settlement device. Can the judge who does not at least take that minimum step of broaching the subject of settlement say that he is making the most of his pre-trial conferences?

As to how far the judge may go in encouraging settlements, we submit that Judge Delehant's practice, as decribed by him on page 43, goes considerably beyond the limits frequently set, and yet is in all respects above criticism.

Bar Associations Can Help

The JOURNAL again invites the attention of state and local bar association executives to the traffic courts program described in the article by Mr. Economos on page 56. Traffic is usually thought of as a metropolitan problem, but if the conferences have been found profitable in such rural states as Montana and Nevada, there is no state or section of a state in the country where study of this subject will not be well repaid.

Bar organizations in the states where conferences have not yet been held should offer their services in arranging for them. In other states, the Colorado plan of regional follow-up conferences should be investigated. Here is an opportunity for local bar associations in counties and cities.

The JOURNAL asserts that more good can be accomplished for the administration of justice in the traffic court program than in any other reform movement now under way.

Pre-Trial Techniques of Federal Judges

WILL SHAFROTH

FIVE AND A HALF YEARS have passed since the adoption of the new Federal Rules of Civil Procedure, including Rule 16 giving the district judges express power to make use of pre-trial procedure. At the time of the adoption of these rules, the pre-trial conference as a formal proceeding was little known outside the cities of Detroit, Boston and Cleveland, where good use had been made of it in the state courts. A number of federal judges already, however, had been calling together the counsel in particular cases, usually at the beginning of the trial, to find out whether any agreements could be reached as to facts which need not be proved or documents the authenticity of which would be admitted. As early as 1934, Judge George McDermott of the Tenth Circuit Court of Appeals had published an article in the JOURNAL of the American Judicature Society entitled "Just What Is Your Defense?" advocating an informal discussion of the case within a few days after its filing.

When the committee appointed by the Supreme Court to draft the Federal Rules of Civil Procedure set out upon its work, it was with a view to incorporating into the federal system all improvements in practice which seemed of a practical nature. I do not think there is anything in the federal rules which had not previously been tried in some state. It was natural that the state court experience in pre-trial, particularly in Detroit and Boston where it had succeeded in clearing up very bad congestion of the trial calendars, should have attracted the attention of the committee.

The wise men who drew up the federal rules did not, however, require the establishment of a compulsory pre-trial calendar. Instead, they recommended adoption of a rule which was entirely permissive in its nature and allowed each federal court to use pre-trial procedure to the extent and in the manner it saw fit. At one of the institutes held on the subject of the new procedure, Professor Sunderland, a member of the rules committee, was asked why Rule 16 was not made mandatory. His reply, characteristic of his usual good common sense, was that if the district judges didn't like the rule it wouldn't work anyway, and there was no use in making it mandatory because nothing could be accomplished without the sympathetic interest of the judge and there was no way to force him to be sympathetic.

The result has been that there is hardly a single federal judge who has not experimented to some extent with this rule. While those federal courts which have established a pre-trial calendar for all civil cases before they go on the trial list are still very much in the minority, the majority of our district courts use pre-trial procedure, either on the initiative of the judge himself or at the request of one of the parties.

JUDICIAL CONFERENCE COMMITTEE APPOINTED

At the suggestion of Senior Circuit Judge John J. Parker of the Fourth Circuit, a committee to study and report on pre-trial procedure was authorized by the Judicial Conference of Senior Circuit Judges at its meeting last September, and was appointed by the Chief Justice shortly afterwards. Judge Parker is the chairman, and the other members are Circuit Judge Alfred P. Murrah of the Tenth Circuit, Associate Justice Bolitha J. Laws of the District of Columbia, and District Judge Paul J. McCormick of the Southern District of California. Professor Edson R. Sunderland of the University of Michigan has been asked to act with the committee in a consultative capacity, and, as a representative of the Administrative Office, I have been designated as secretary.

The preliminary report of the committee, together with a statement by Professor Sunderland, was circulated to all federal judges and their opinion was asked concerning the questions raised in the report. The thirty-odd letters received from district judges contained

Editor's Note: Mr. Shafroth is head of the Division of Procedural Studies and Statistics of the Administrative Office of the United States Courts, and secretary of the Committee on Pre-Trial Procedure of the Judicial Conference of Senior Circuit Judges. This article is a slightly condensed version of a paper read by Mr. Shafroth before the Fourth Circuit Judicial Conference at Asheville, N. C., June 21, 1944. Both it and the article by Professor Edson R. Sunderland in this issue are products of the work of the Judicial Conference Committee on Pre-Trial Procedure, as explained by Mr. Shafroth in the text.

many valuable comments and suggestions, and are the source material upon which the remainder of this article is based.

OPINIONS OF THE DISTRICT JUDGES

The first question in our preliminary report asked for the results which have been achieved by pre-trial procedure. As was to be expected, most of the judges who responded to Judge Parker's invitation to comment on the report (you will note it was not a questionnaire) were strongly in favor of pre-trial procedure, and their general opinion was that it was producing excellent results. This is not necessarily a reflection of the attitude of the entire federal bench, but I feel very confident in saying that there are few if any United States district judges who would desire to repeal the rule as long as it remains in its present form, leaving the judge the option of using the procedure if and when he chooses and permitting him to employ it in such manner as he sees fit.

The next question related to the objections raised to the use of the procedure by judges or lawyers. As far as judges go, the only objections voiced were that in some instances it was thought that no results were accomplished. In most districts where pre-trial is used, the judges report that the bar cooperates and is favorable to the rule. Individual objections on the part of attorneys sometimes arise from a reluctance on the part of counsel to show their hand before trial, a fear that they will be unduly limited in the presentation of their case on trial, or fear that the case will be prejudged or that they will be forced into a settlement.

It is apparent that these are not valid objections to pre-trial, and the way to dissipate them is to instill confidence in these attorneys by the manner in which pre-trial is conducted.

BEST TIME IS SHORTLY BEFORE TRIAL

The testimony of the district judges is overwhelming that the best time for pre-trial is shortly before trial and this means not less than one week and not more than three as an objective to be attained where possible. The reason for this is that by that time the deadline is close enough so that the parties come in to pretrial knowing what they are going to prove, what the issues are, what documents are to be introduced and knowing also that actual trial is imminent. At the same time they may not yet have called in many of the witnesses and there remains the possibility of saving much time and expense if stipulations concerning certain facts can be agreed on. Furthermore, it cannot be questioned that the possibilities of settlement are greatly enhanced as the trial day approaches.

Some judges call a conference of attorneys at the beginning of the trial itself and at that time endeavor to segregate and eliminate issues and obtain admissions regarding facts and documents. As Professor Sunderland has said, it is doubtful whether this should be considered as a true pre-trial hearing, since it fails to accomplish a major purpose contemplated by Rule 16 in reducing the burden of preparation for trial and eliminating the necessity for the attendance of witnesses to prove uncontroverted facts. I do not mean to intimate that in my opinion such attempts to shorten the trial are not valuable where a pre-trial conference well in advance of trial is not feasible, but I am convinced that where good results are accomplished by this method greater advantage would have been secured if the same proceeding had been held earlier.

One other factor is of great importance. We all know that the great majority of cases reaching issue never get to trial. When cases at issue are put on the calendar there is no knowing how many of them are going to be continued, postponed, dismissed, or otherwise go off the calendar. If pre-trial occurs within the one to three-weeks period before trials are scheduled to begin, it is possible to find out with some fair degree of certainty what cases are actually going to be tried, how much substance there is in them, and how long the trial will take. This means that a trial calendar can be set which will enable each lawyer to have a good idea of when his case will be reached and in many instances cases can be set for a day certain. The saving of time to lawyers and witnesses by such a method is highly desirable.

PRE-TRIAL IN RURAL DISTRICTS

Now if the judges who have reported to our committee as to this timing are sound in their opinions concerning it, the question arises—is it possible or profitable to do this in a district having four to six or more places of holding court, with terms at least twice a year? In

this connection the testimony of Judge Fred L. Wham of the Eastern District of Illinois is worth quoting. There are in his district four places of holding court, divided between him and Judge Lindley. Here is what he has to say:

"As you know, the Eastern District of Illinois is a rural district, and litigants and attorneys come from long distances within the district to present their cases. The attorneys live considerable distances apart and ordinarily would not see each other until the case came on for trial. To meet this situation, I usually make it a practice to set apart a day or two days about three weeks before the beginning of each term of my court on which all cases which are at issue and have not been pre-tried are set for pre-trial. In the beginning of the day I call the calendar of the cases which are ready to be set for trial and those which are set for pre-trial. As a result of the call I set all of the cases which are ready and in this way am able to get a trial calendar which the attorneys understand will be carried through as made. Immediately following the call of the calendar I begin hearing the pre-trials in chambers. Awaiting their turn, the lawyers from over the district sit out in the courtroom after having been invited by the court to become acquainted and to discuss their cases and the matters which can and should be disposed of in the pre-trial hearing; also to discuss settlement if either party is interested. All of this has been preceded by a letter to each attorney advising just what will be done on that day and what he should be prepared to do. The result is that the attorneys usually come into my chambers with some idea of what we can accomplish and what they want to accomplish in the pre-trial hearing. Consequently, the pre-trial hearing does not take long and is usually effective in so far as it is in a case that can be advantageously dealt with in a pre-trial hearing. As soon as the pre-trial hearing is concluded, if the case is ready for trial or will be during the succeeding term, it is put on the trial calendar with the attorneys present and they understand that it will be tried on that day unless unavoidably prevented or settled in the meantime."

Judge John W. Delehant of Nebraska, another pre-trial enthusiast, holds his pre-trials in Lincoln, a central point. He states:

"We hold relatively constant session in Lincoln and Omaha and comparatively rare sessions in six smaller divisions. As to the latter group, I have used the pre-trial conference effectively, generally by calling the conference at a time convenient to counsel and in my own chambers in Lincoln, but on at least two occasions by holding the conference in the outlying division where the trial is to be had."

Judge Frank L. Kloeb of Toledo, who sets a pre-trial calendar for all cases in which a trial notice required by the practice of that district has been filed, also finds virtue in pre-trial as an aid to establishment of a stable trial calendar. He writes:

"I find also that I am able to discover whether there is any meat in certain cases, and obtain the opinion of counsel on both sides as to how long it will take to try each of the cases. This results in a great saving of time for the court, as cases can then be so spaced at the pre-trial conference as to conserve time and award time according to the merits involved in each case. This system, also, is very beneficial to counsel, because they are able to secure a day certain for the trial of their case, rather than to be assigned with six or eight cases for a particular week without a day certain and thus be required to be ready for court during that entire week."

I think we are entitled to list this feature of winnowing the wheat from the chaff and developing a firm calendar of cases for trial as a major advantage of pre-trial in any district. The extent to which judges use it for that purpose will, of course, depend upon their own enthusiasm for the rule and upon their own individual calendar practices, which are as many and as varied as the colors in Joseph's coat.

TYPES OF CASES SUITABLE FOR PRE-TRIAL

While it is true that pre-trial procedure can be used in any type of civil case, its effectiveness may differ in different kinds of actions and it may vary greatly even as between actions of the same kind depending on the complexity of the case, the nature of the issues, and the kind of testimony which will be needed to sustain them. Where there are rules requiring every case at issue to be put on the pre-trial calendar, usually no exceptions are made. In the District of Columbia, where the federal court also has local jurisdiction, divorce cases, a certain type of patent case under Section 4915 of the Revised Statutes, which amounts to an appeal from the Patent Office, and veterans' insurance cases, which are investigated by a special court commissioner, are excluded. Most of the judges who are pre-trial advocates, however, feel that the procedure can be used advantageously in any kind of civil case. The committee in its preliminary report mentioned forfeiture and habeas corpus cases as types in which a conference might not be particularly useful, but at least one judge thought both of those should be included.

Cases involving negligence, breach of con-

tract, condemnation where a large number of tracts are involved, wage and hour cases, and insurance were frequently listed. Judge W. Calvin Chesnut of Maryland makes particular mention of long cases and situations where there are a series of cases involving a common critical issue of law or all growing out of one related series of facts and where there are different counsel in the several cases. He further states it as his opinion that it is the nature of the evidence to be produced in the particular case rather than the classification of the type of action that should be controlling.

Judge Bower Broaddus of Oklahoma, who has pre-tried all his civil cases for four years, says:

"Pre-trial hearings may be held advantageously in cases arising from torts, contracts, real properties, war risk insurance, condemnation, anti-trust laws, Fair Labor Standards Act, and rate schedules.

"In the land condemnation cases special values often have been involved—such as the value of the land for oil and gas, lead and zinc, rock and other purposes. When special values have been involved, that fact has been determined and the number of expert witnesses limited. Where a portion only of a tract has been taken, the question of severance damage has been considered, and fully outlined at the hearing. At the conclusion of the pre-trial conference, counsel for the litigants knew the special values to be considered and the legal questions in dispute. This prevented surprise upon the trial. Guarding against surprise was of importance in those cases tried before a jury."

PRE-TRIAL IN CRIMINAL CASES

As to the use of pre-trial in criminal cases, there is a very considerable difference of opinion. It is not widely used at the present time, and some judges feel that the pressure which can be put on a defendant even in a "voluntary" proceeding is highly undesirable and "somewhat dangerous in its constitutional impact." This again gets back to the manner in which it is used, and I assume that none of us would favor its employment to urge the defendant either to plead guilty or to make admissions against his interest.

However, I call attention to a letter from Judge Paul C. Leahy of Delaware, in reference to the Mantle Club mail fraud conspiracy case which he tried last year.

"In January, 1943, I was about to commence the trial of a criminal case involving seventeen defendants, wherein it was estimated that the case would take seven months to try. While there was no judicial or statutory authority for calling a pre-trial conference in a criminal matter, I nevertheless called the attorneys for the government and the defense into chambers and asked if they wished to cooperate. In the particular case in question we had approximately 6,700 exhibits. With the exception of about a dozen particular writings the parties had agreed on authenticity and materiality before the trial commenced. I shall not detail other matters that were stipulated prior to trial. The point is that we cut the trial down to four months. I am informed that there is a considerable opinion among federal judges which is opposed to pre-trial in criminal matters, but I cannot share this view."

This is the exceptional type of criminal case where much can be accomplished in pre-trial. Since there are particular instances where criminal pre-trials may be of great value, is the Criminal Rules Committee not justified in advocating inclusion of a rule on the subject, leaving its use to the sound discretion of the individual judge?

There would seem to be little scope for pre-trial in appellate proceedings and no need for any rule regarding it, but where an appellate court wishes to call counsel together for a particular reason in advance of argument, I see no reason why it should not do so.

Rule 16 set out the main subjects to be discussed at the pre-trial conference, including the simplification of the issues, amendment of the pleadings, admissions of fact and stipulations as to the admission of documents subject to objection at the trial as to relevancy, and in some cases the limitation of expert witnesses. Where special verdicts are used, the questions to be asked of the jury may be framed if counsel can agree on them, although some judges think this will usually have to be done after the evidence is in.

DISCUSSION OF SETTLEMENT IN PRE-TRIAL

Then there is the question of settlement, which is not specifically mentioned in Rule 16. It cannot be doubted that it is a great saving of time to court, counsel and litigants to settle lawsuits instead of trying them. Any procedure which does this without infringing on the fundamental rights of the parties is performing valuable service. Pre-trial made its initial reputation in Detroit and Boston through its ability to secure settlements. It is the opinion of the judges in the District of Columbia that it has been very effective there in that direction.

In those courts, however, the pre-trial judge does not try the case. His expressed opinion as to the strength or weakness of one side or the other cannot be thought to be a bias of the trial judge which has doomed that party's chances in the lawsuit. In view of the fact that federal districts where the pre-trial judge does not try the case are very few, the committee has asked, "To what extent should settlement be discussed by the pre-trial judge?"

It may be stated with a good deal of certainty that the committee has no intention of seeking to have a mandatory rule prescribed on this subject. This will be left up to the district judges, but here again the opinions of the judges expressed to the committee are valuable. In general the opinion is that it is proper for the judge to ask the parties whether settlement has been discussed. This opens the subject up and there are many judges who will not go further without the request of the parties. I quote five district judges on this subject.

Judge Shackelford Miller, Jr., of the Western District of Kentucky:

"I find that very often attorneys strongly object to efforts on the part of the court to bring about a settlement, and while appropriate suggestions might be made at times, yet I do not like to emphasize that feature. I believe that an attorney is very apt to get the impression that you have prejudged his case and are unsympathetic to his position, with resulting dissatisfaction in the way in which the case is terminated. A large percentage of cases set for trial in this district are actually settled before trial without pre-trial conferences or suggestions to that effect by the trial judge, and I have found very little reluctance on the part of attorneys to discuss such a question among themselves. On the other hand, a pre-trial hearing often discloses to counsel a real weakness in his case and naturally leads to negotiations for a settlement and possible settlement without it being necessary for the judge to suggest it or urge it. This is no doubt a valuable by-product of pre-trial procedure."

Judge W. Calvin Chesnut, of the District of Maryland:

"In my view, this should generally be left to counsel to take the initiative. I think the case should be exceptional in which the trial judge should initiate the discussion of a possible settlement. When there is a very congested court docket and it is obvious that the case, such as many negligence cases, involves amount rather than liability, it is certainly not inappropriate for the trial judge himself to suggest that counsel consider settlement."

Judge J. Waties Waring, of the Eastern District of South Carolina:

"I think that no judge should force a settlement and use or misuse his power to force a settlement by stating what he will do in regard to direction of verdict. On the other hand, I think it clearly within the province of the trial judge to suggest to the attorneys that there may be some common ground for discussion and state to them that they might try to have a meeting of their minds. He has an opportunity to suggest this if he has resolved certain doubts, misunderstandings or issues and brought the case down to a narrow compass. I think a judge might sometimes go further and where he sees that one of the parties is probably interposing sham or frivolous matter that he might state to the attorney that if the matter is substantial of course it should go to trial, but if it is found that claims or defenses are without any foundation that Rules 36 and 37 may be invoked."

Judge Fred M. Raymond, of the Western District of Michigan:

"Because of drastic criticism of pre-trial conferences in which the judge is alleged to have endeavored to force settlements, I have been very careful to do no more than open the subject to discussion among counsel, without projecting my own views. A judge can easily disqualify himself (at least in the minds of parties or their attorneys) by participating too strongly in efforts to bring about a settlement."

Judge John W. Delehant, of the District of Nebraska:

"To what extent should settlement be discussed by the pre-trial judge? Certainly not to such an extent as to amount to coercion or actual moral pressure. But, that having been said, it seems appropriate to add that the judge ought not to disdain to bring the subject of settlement to the attention of counsel during pre-trial conference in any case which may appropriately be settled.

"In practice, under the final paragraph of the rule, I almost invariably close my own participation in the conference by an inquiry in something after the following fashion: 'Finally, gentlemen, have you explored the possibility of the mutual adjustment of your case?' If the answer is negative, it is followed by a second inquiry as to whether counsel think that subject may profitably be considered. Unless the answer to this further question is also negative, I quite uniformly suggest that the facilities of the court chambers and the attorneys' consultation room are available for conference between counsel upon the subject of adjustment, and that it is the general policy of the court to encourage such efforts.

"Beyond that, I do not go; and I definitely insist on remaining away from any conferences between counsel upon the subject of settlement, or participating in any way in the further discussion of this question. Lately, in cases triable to juries, I have occasionally presumed to remind counsel of the practical difficulty and injustice that is involved in assembling and retaining juries in the present crisis, and intimated that they may not unwisely consider that factor in approaching the problem of settlement."

The committee has stated its opinion to be that settlements are a useful by-product of pre-trial procedure and they will result in many cases after the strength and weakness of each side becomes apparent at the conference without pressure from the judge. The answers received tend to fortify this position. Of course, where there is a separate pre-trial judge, many strictures upon the free expression of his opinion concerning the case are not applicable.

WHERE SHOULD CONFERENCES BE HELD?

About two judges out of three prefer to conduct pre-trial proceedings in chambers because of the greater informality of the atmosphere. Judge Broaddus of Oklahoma is an advocate of hearings in open court for these reasons:

"Pre-trial hearings should be conducted in court. When so held, the attorneys and the judge proceed toward the business at hand and omit personal matters and discussions having no bearing upon the case or cases being considered. The hearing in the court room permits other counsel to be present and to witness the method of procedure, and thereby be better prepared to conduct the hearing of the case in which such counsel may be interested. The court room hearing should be beneficial in promoting the use and effectiveness of pre-trial hearings."

PREPARATION FOR PRE-TRIAL

Some judges examine the pleadings before pre-trial; others do not. Some difference may be warranted, as suggested by Judge Chesnut, between situations where a conference is requested by the attorneys and instances where there is a regular pre-trial calendar. In the latter case, he feels the judge should familiarize himself with the pleadings.

Several judges felt that to require advance preparation by the lawyers of a written statement of the case or written stipulations which they desired should be entered into would give the proceedings a formal cast which they wished to avoid. Of course, the lawyers are expected to be ready to discuss their cases, to know what their evidence at the trial will be, and to have in mind the stipulations they want.

PERSONS PRESENT AT PRE-TRIAL

Usually only the lawyers who are to try the case are present at pre-trial, but if they desire to bring their clients with them, that is permitted by most courts. Witnesses, too, are sometimes present, but this would seem to be unnecessary in the usual circumstances.

Reporters are now used in very few courts and most judges feel that their presence would put an effective damper on full and frank discussion of the case if a transcript of the proceedings was to be made. However, the value of drawing the pre-trial order and stipulations agreed to by counsel in their presence before the conference adjourns in worthy of consideration. A secretary or stenographer may be used for this purpose but it is quite likely that, when as and if official salaried reporters become available under the new act, they may be used for this purpose but not for taking down the conference proceedings.

THE PRE-TRIAL ORDER

Rule 16 provides that the court shall make an order setting forth the action taken at the pre-trial conference, the agreements reached, and other pertinent facts. A main purpose of this order is to assist the trial judge in holding down the trial to the actual issues which the parties have agreed on at the conference.

It appears, however, that often where the conference is of a very informal character, it has been considered unnecessary to enter such an order and the parties have either been asked to draw up and file written stipulations embodying the agreements arrived at or have gone to trial without such agreements having been written out at all.

The danger of this practice would seem to be not in the reliance it places on the good faith of counsel but rather in the danger of misunderstanding or forgetfulness as to the exact agreement reached.

A very usual practice is for the pre-trial

judge to dictate an order at the close of the conference in the presence of counsel with the privilege on their part to object to any part of it which does not accord with their understanding. In the District of Columbia the order is dictated to a typist in the courtroom and is initialed by cousel before they leave the conference. On the other hand, Judge Delehant, of Nebraska, prepares the pre-trial order himself but gives the attorneys no chance to object to it at the conference. Copies are afterwards supplied to them and they have the right to file objections, in default of which the order becomes final. In still other jurisdictions the transcript of agreements reached and of the issues in their streamlined form, as developed at the conference, is itself considered as a pre-trial order which guides the course of the trial.

No doubt is expressed by any judge as to the binding force of the pre-trial order in controlling subsequent proceedings, but there is often a saving statement that plain errors can be corrected. It seems to me this is adequately covered in the rule where it says:

"Such order when entered controls the subsequent course of the action unless modified at the trial to prevent manifest injustice."

SANCTIONS

In reference to sanctions for enforcing the attendance of the attorneys at the pre-trial conference, this is an incident of pre-trial procedure which seems to have caused no difficulty. Judge Francis J. W. Ford, of Massachusetts, calls attention to the form of notice of the conferences used by his court which provides that non-suits or defaults may be entered at the time of the conference. He states that it is rarely necessary to enter such orders.

USE OF DISCOVERY OR SUMMARY JUDGMENT

As to the use of summary judgment and discovery at the pre-trial conference, there is an evident disposition on the part of district judges to proceed with caution. Judge Lewis B. Schwellenbach, of the Eastern District of Washington, believes that pre-trial should not be used to avoid the requirements of the discovery and summary judgment rules without full consent of the parties, and adds that this will help to create confidence in the bar in pre-trial procedure.

On the other hand, Judge Broaddus, of Oklahoma, and Judge Wham, of Illinois, feel that the court should have the power to enter any order which would promote or expedite discovery under the rules. This appears reasonable to me.

As to summary judgment, it is equally reasonable that the parties should be given ample opportunity to oppose such a motion even if this means a postponement of hearing and decision to a later date.

CONCLUSION

The benefits of pre-trial are becoming known in all parts of the country. Its usefulness in clearing congested dockets has been widely advertised and justifiably so. But the letters which have been sent to Judge Parker by many district judges emphasize the value of the procedure in the non-metropolitan districts where the dockets are not heavy and there is no delay in getting to trial. Many of these judges emphasize the virtue which lies in the flexibility of the rule and believe very strongly that this flexibility should be maintained and no formal requirements of procedure should be added to it.

It is impossible to read these enthusiastic comments of able trial judges on the value of the rule without becoming convinced that it is being effectively used to reduce the number of trials and to shorten the time of trials and lessen their expense to the parties.

In the same way that the procedure is ineffective unless the judge feels that it can be made to produce worthwhile results, pre-trial will not succeed if the bar opposes it. The lawyers must cooperate, particularly in making a full disclosure of their case at the conference and in attempting to eliminate the necessity for proof of matters which are not in dispute. The testimony of the judges is that there has been little difficulty with the lawyers on these scores when they have become convinced that the pre-trial is being fairly conducted without advantage to one side only and their cases are not being pre-judged.

There is little doubt that the use of the pre-trial conference in both state and federal courts will continue to grow as it becomes more and more evident that it is a useful procedural tool to improve the administration of justice.

Procedure for Pretrial Conferences in the Federal Courts

EDSON R. SUNDERLAND

RULE 16, of the Federal Rules of Civil Procedure, authorizes, but does not require, the court to hold pretrial conferences. The matter is entirely discretionary with the court, and this discretion may be exercised by a general rule instituting a pretrial calendar or by special orders in particular cases. The court in every district is therefore free to make whatever use of this procedural device it may deem desirable.

The same freedom of action is accorded to each district court in regard to the methods to be employed in conducting pretrial conferences. The rule provides no procedure whatever, either by way of requirement or suggestion.

This complete absence of regulatory rules gives to the pretrial hearing the maximum degree of flexibility, and enables the judges who use it to exercise the widest possible discretion in devising and utilizing methods for making it effective.

As a result there has been great variety in the methods adopted by different judges in conducting these hearings, and even by the same judge in different cases.

Nevertheless, since all pretrial hearings are designed to accomplish the same general purposes, and since all of them operate under quite similar conditions and deal with substantially similar material, it should be possible to derive from the numerous plans employed certain principles which will facilitate the operation of the pretrial hearing and increase its effectiveness, without restricting its flexibility. These principles, which might well include numerous alternative processes, would constitute a basic procedure for the administration of the pretrial conference.

The chief obstacle to the development of such a procedure is the want of any adequate means of disseminating information among the judges and lawyers of the several districts regarding the methods employed in other districts. Only by trial and error can a satisfactory plan of operation be developed. As a regular step in our system of litigation the pretrial conference is an innovation, supported by no precedents and by little experience. Each district judge should be able to study the methods used by other judges, compare them with the methods employed in his own court, and vary his own practice from time to time in accordance with the best advice he can get. Only in that way can an adequate procedure for conducting pretrial hearings be developed as a practical evolutionary process. This would require the experiments of the various judges to be reported for the information of other judges engaged with the same problems.

But no such system of reporting has yet been developed upon a scale sufficient to produce very definite results. An examination of the Federal Supplement and the Federal Rules Decisions shows an amazing dearth of material upon the procedure employed in the conduct of pretrial hearings. Even the few cases which report these conferences devote more attention to the results than to the methods by which they were reached.

At the present time, therefore, the chief sources of information as to the actual operation of the pretrial conference must be found in the language of Rule 16, in articles and addresses containing descriptions of the process by judges who have used it, and in the unpublished records and files of their courts. From these enough data can be assembled to give at least a general indication of the way in which an appropriate procedure for administering the pretrial conference is being gradually worked out.

PURPOSES OF THE PRETRIAL CONFERENCE

These are stated in Rule 16. Five specific purposes are expressly mentioned, followed by a sixth designation embracing "such other matters as may aid in the disposition of the ac-

Editor's Note: This paper was prepared by Professor Sunderland, of the University of Michigan Law School, at the instance of the Committee on Pretrial Procedure of the Judicial Conference of Senior Circuit Judges, for private distribution to members of the federal judiciary. The numerous practical suggestions it contains make it of equal value to state court judges interested in getting the most out of pretrial, and the JOURNAL has obtained permission to publish it for the purpose of making it available to them and to others interested.

tion." Analysing the rule as a whole, it seems designed to serve at least four general purposes:

1. To identify, designate, and clarify the true issues and eliminate apparent issues which present no real controversy.

2. To facilitate proof, by means of stipulations regarding (1) admissions of facts and genuineness of documents, (2) waiver of formal proof of documents and things, (3) physical or mental examination of the person, (4) inspection of books or property, (5) interrogatories and depositions, (6) limitation upon the number of witnesses, (7) references to a master to make findings, and (8) other similar matters.

3. To offer a convenient opportunity for disposing of preliminary matters, such as dismissal, change of venue to another division, judgment on the pleadings, summary judgment, consolidation of cases and separation of issues for trial, fixing the date of trial, etc.

4. To encourage settlements.

1. IDENTIFYING THE TRUE ISSUES

Two methods appear to have been used for this purpose.

In one the judge himself examines the file of the case in advance of the hearing, and by analyzing the pleadings and other papers on file makes a preliminary determination of the essential issues. This obviously imposes a substantial burden upon the judge. At the hearing he states in the presence of counsel what he conceives to be the nature of the case, and the real issues involved, and by mutual discussion an agreement is thereupon reached as to what matters of law or facts are in dispute. This agreement is then dictated into the record of the pretrial hearing as an order limiting the scope of any subsequent trial that may take place.

Under the second method, instead of carrying the main burden of preparation himself, the judge requires counsel for each party to participate in the preparation by filing and serving, in advance of the hearing, proposed findings of fact and conclusions of law covering the case as counsel sees it. As to each finding a memorandum may be required stating the nature of the evidence by which counsel proposes to establish it, and as to each conclusion of law, a reference may be required to any controlling statute or judicial decision. This procedure not only aids the judge in obtaining an accurate understanding of the case, but compels counsel to make a careful study of it in advance of the conference. By this means both judge and counsel are prepared to act promptly and effectively in agreeing upon an order designating or eliminating various issues of law and fact.

Some judges have sought to reach the same result by warning counsel in advance of the necessity of preparation for the pretrial hearing. Judge Laws, in the District of Columbia, has used the following form of notice: "Lately it has been noticed that a number of counsel at pretrial hearings have not been sufficiently prepared to adequately conduct the hearings. It is important that a full and frank discussion of facts should be had at pretrial hearings and also that points of law with relation to the cases should have been studied prior to the hearing, to the end that untenable issues may be eliminated. Moreover, counsel should not appear at pretrial hearing without having discussed with their clients the possibility of compromise settlements. In cases where actual financial losses are claimed, an accurate up-to-date statement should be prepared and be available. In personal injury cases counsel should have the advice of a competent physician with respect to claims of personal injuries, so as to be able to inform the court at pretrial as to what will actually be claimed rather than what is claimed in the declaration filed fourteen to twenty months previously. Wherever cases involving many documents or complicated issues are called, it will be of assistance if counsel arrange to confer prior to pretrial hearings."

2. FACILITATING PROOF

The ordinary machinery established for making proof contemplates a strictly adversary proceeding in which the proponent must carry the burden of affirmatively establishing admissibility. This frequently makes it necessary to incur much expense and inconvenience to satisfy formal requirements of proof, such as calling custodians of books or documents of persons having knowledge of handwriting, establishing the regularity and authenticity of entries in books of account, proving the authorship of letters received through the mails, laying a foundation for introducing secondary evidence, dispensing with the testimony of at-

testing witnesses, authenticating copies of public documents, justifying the use of maps, diagrams and charts, etc. Any or all these requirements may be waived by the parties as a means of avoiding expense and delay, and the pretrial conference offers a convenient occasion for fixing the scope and terms of such waivers.

In one case, unreported, where a large number of documents were involved, the pretrial order recited stipulations in regard to the genuineness of documents and to the use of copies of original documents, with 98 pages of listed items of exhibits.

Subsequent resort to compulsory discovery processes may also be limited or avoided by considering, at the pretrial hearing, what discovery ought to be had by way of inspection of documents or things, mental or physical examination, interrogations, admissions and depositions. The pretrial discussion is likely to indicate the particular matters regarding which the several parties are in need of material information which can be furnished by their adversaries. The precise nature and extent of the desired information, and the conditions under which it should be suffered, can readily be fixed by the stipulations set forth in the pretrial order. Such a method of dealing with discovery, in connection with the identification and designation of the issues, will tend to prevent expensive discovery excursions into matters not really involved in the case, and to restrict the methods by which discovery is to be obtained to those which are most economical and convenient. It has been held that costs cannot be taxed for fees of witnesses called to give depositions upon matters outside the scope of the issues as fixed by the pre-trial hearing. Federal Deposit Ins. Co. v. Fruit Growers' Service (1941, D.C.E.D. Washington.) 2 F.R.D. 131.

Cases sometimes involve operative or mechanical processes which are so complicated as to lead the parties to provide special devices for exhibiting them at the trial. The need for such devices may appropriately be taken up at the pretrial hearing. In a case where a party spent several thousand dollars preparing elaborate illustrations and exhibits in the form of photographs and moving pictures to be used at the trial, it was held that this expense could not properly be taxed against the unsuccessful opponent where it had not been approved by the court at the pretrial hearing. Gotz v. Universal Products Co. (1943 Dc. Del.) 3 F.R.D. 153.

To make the pretrial hearing most effective in simplifying and facilitating proof, the items of evidence upon which the parties intend to rely should be clearly shown at the hearing. This may be accomplished by the filing and serving, in advance of the pretrial conference, of proposed findings of fact with a specification under each of the character of the evidence by which it is to be established. Where such proposed findings are not used, lists of items of proof to be dealt with at the conference may be required in advance from each of the parties, and the stipulations to be embodied in the order can then be readily passed upon item by item. In lieu of such lists the judge may request the exhibits themselves to be brought to the pretrial hearing, where they can be dealt with one at a time, or group by group, with a view to eliminating all unnecessary expense, delay and trouble in making them available as proof.

As a means of avoiding unnecessary expense in carrying on proceedings for discovery, there will be an advantage in holding the pretrial conference as soon as possible after the pleadings are filed. On the other hand, stipulations regarding the narrowing or elimination of issues can usually be made more effectively after the parties have thoroughly canvassed the possibilities of proof by the use of discovery. Only experience will show whether an earlier or later date will be likely to yield the greater benefits, and how far early hearings may be advantageously supplemented by adjourned hearings at later dates.

Some judges in effect postpone the pretrial conference to the date set for the trial itself, by undertaking, before the trial is actually begun, to segregate and eliminate issues and obtain admissions regarding facts and documents. It is doubtful, however, whether this should be considered in any true sense a pretrial hearing; for it does nothing to reduce the burden of preparation for trial or to relieve witnesses from the duty of attendance. It merely constitutes a very desirable feature of the trial itself in cases where no real pretrial hearing has been held.

3. DISPOSITION OF PRELIMINARY MATTERS

Many provisions of the present federal rules

are designed to effect economy of time and effort by encouraging or requiring the simultaneous rather than the successive presentation of matters requiring adjudication. It is contemplated, as a general principle, that when any feature of a case is brought up before the judge for consideration, the occasion should be availed of for bringing up all other matters then in dispute which can be conveniently presented and dealt with at the same time.

This principle is broadly applicable to the pretrial hearing. The purpose of such a hearing, as stated by Rule 16 (6), includes the consideration of all matters which "may aid in the disposition of the action."

If, therefore, it should appear on the pretrial hearing that the court lacks jurisdiction of the case, or that the action or some part of it should be dismissed on the merits, or that the pleadings are such that judgment should be rendered thereon, or that a summary judgment ought to be entered, every consideration of efficiency and convenience would demand that the proper order or judgment should then and there be entered, subject to such continuance, if any, as justice might require.

Orders prescribing or limiting subsequent proceedings in the cause, such as transfer to another division in the district, consolidation of cases, or separation of issues, for trial, fixing the date of trial, are also appropriate on the pretrial hearing, as well as orders for adjourned sessions of the pretrial hearing itself.

Some judges use a form of notice of pretrial hearing containing a warning that the court may proceed to judgment on such hearing. Perhaps a broader notice should be employed, making special reference to the various preliminary matters which might be brought up for determination.

4. ENCOURAGEMENT OF SETTLEMENTS

One of the major purposes served by the pretrial conference is to afford a convenient occasion for discussing the possibilities of a settlement. It is always embarrassing for one party to suggest settlement to the other, because such a suggestion may be thought to carry the implication that the party lacks confidence in his case. When, however, the discussion of settlement comes up in the regular course of procedure, as a normal part of the pretrial conference and at the instance of the presiding judges, this cause of embarrassment disappears.

The exact position and the degree of importance to be assigned to this feature of the pretrial conference, are matters regarding which there is a considerable difference of opinion.

Some judges, considering this the chief purpose of the proceeding, open the conference with a request for suggestions of settlement, and deal with other features of the conference as more or less incidental to that fundamental aim.

Other judges conduct the pretrial conference on the assumption that a trial is expected to take place, and that the chief purpose of the conference is to reduce as far as possible the time, money and effort which must be expended by parties, counsel, witnesses and the court both in preparing for it and carrying it through. These judges believe that settlements are usually based upon an understanding by each of the parties of the elements of strength and weakness in their several positions, and that when these elements are exposed by the pretrial discussions, admission and stipulations, the foundation for a settlement has been laid, and its consummation will require comparatively little direct aid from the judge.

The effect of these two views as to the emphasis to be placed on settlements is likely to be reflected in the procedure employed in administering the conference. If settlement is the primary objective, less attention will probably be given to detailed stipulations for facilitating proof, and to the disposition of preliminary matters, because in the event of a settlement they will become unnecessary.

It would seem, therefore, that the maximum benefit from the pretrial conference would be obtained if it were administered primarily for the purpose of designating and eliminating issues, facilitating proof and disposing of preliminary matters, with settlements playing a secondary role.

Integrated Bar Created by Missouri Supreme Court

FORREST M. HEMKER

By a court rule adopted June 16, 1944, the Supreme Court of Missouri organized the entire bar of Missouri into a fully integrated all-inclusive unit.

Ten years ago, in 1934, the court had, also by rule, created the Missouri Bar Administration, whereby in the exercise of its inherent powers, the court assumed jurisdiction of the admission and disbarment of attorneys and the unauthorized practice of law. These matters have ever since been administered by bar committees appointed by and responsible to the court and are expressly excepted from the rule now adopted.

The new rule provides that the new body shall be known as the Missouri Bar. The representative governing body is a Board of Governors of twenty-nine lawyers elected from twelve districts. St. Louis, with 2,274 lawyers, has seven representatives, while Kansas City, with 1,418 lawyers, has five representatives. The remaining seventeen representatives are distributed by districts throughout the State, with approximately one Board member for each two hundred and twenty-five lawyers. Board members are to serve for two years, staggered terms being created so that fourteen are elected one year and fifteen the next.

Cumulative voting is permitted. The usual officers are provided for and are to be elected by the Board of Governors. The Board has power to determine questions of policy, but it is provided that ten members of the Board, or ten percent of the bar, may call for submission of any question to a vote of all the lawyers of the state. Such a vote may also be called for by action at an annual meeting. A full-time executive secretary is to be employed by the Board and a central office established. The first Board will be elected prior to and take office on September 30, 1944, on which date the voluntary Missouri Bar Association will cease to exist.

The new body is financed by an enrollment fee of $7.50 per year per member, $5.00 of which constitutes a fund for use by the Missouri Bar and $2.50 of which will be used for the maintenance of the Missouri Bar Administration in connection with admission, discipline and unauthorized practice.

The activity leading to the adoption of the foregoing plan may be of interest to the bars of states wherein the subject is now receiving consideration. It is true that as early as 1921 the Missouri Bar Association had interested itself in an all-inclusive organization and, in 1923, unsuccessfully sought incorporation by legislative enactment. It cannot be said that these efforts provided the impetus which led to the present success. The matter began to receive active attention again in 1930, when the State Association unsuccessfully sought incorporation by legislative enactment. Again in 1933 the same effort was made with the same result. It was following the unsuccessful campaign of 1933 for legislative action that the Supreme Court, in 1934, adopted the rule referred to and created the Missouri Bar Administration, from which time on Missouri has been referred to as a partially integrated State.

In 1933 the Lawyers Association of the Eighth Judicial Circuit (St. Louis) was organized. Integration was one of its stated purposes and in 1942 it unsuccessfully sponsored legislation for incorporation. On February 27, 1942 the Missouri Bar Association petitioned the Supreme Court requesting the appointment of a Committee to investigate integration and make recommendations. This petition was denied in March of 1942 without prejudice. Prior to this effort by the state bar the Kansas City Bar Association began to give the subject its attention through special meetings and committee study. The Lawyers Association of Kansas City did likewise.

Early in 1943 the Bar Association of St. Louis created a special committee to investigate and report on the matter. This committee sponsored a general meeting for all lawyers in St. Louis in June of 1943. The Missouri Bar Association, throughout 1943, continued to give the subject attention. Early in 1943

Editor's Note: Mr. Hemker is president of the Bar Association of St. Louis, and was a leader of the Missouri bar integration campaign.

the Lawyers Association of St. Louis had filed a petition in the Supreme Court of Missouri seeking amendment of the rules regarding the Missouri Bar Administration so that "the lawyers of Missouri will be enabled to act as a united organization on all such matters as affect or pertain to the welfare of the bar and the administration of justice."

Subsequently, the Lawyers Association of Kansas City and the Kansas City Bar Association passed resolutions favoring integration and suggesting a state-wide convention to consider the matter and formulate a plan of government. At the annual meeting in October, 1943, the Missouri Bar Association passed a similar resolution. The Bar Association of St. Louis did likewise at its meeting in October, 1943. The Women's Bar Association of Missouri, the Women's Bar Association of Kansas City, the 38th Judicial Circuit Bar Association and the Jasper County Bar Association all came out in favor of integration. On December 6, 1943, at a hearing on the petition of the Lawyers Association of St. Louis, representatives of the Missouri Bar Association and practically all of the voluntary associations in the state appeared and urged the court to act. The result was that by order entered that day the Supreme Court created what was subsequently known as the Supreme Court's Committee on Integration of the Bar. There were eleven members of the committee comprising prominent members of the bar from all sections of the state. The court charged the committee with the duty to determine whether the bar of Missouri should be fully integrated and to prepare a plan of government for submission to the bar and the court.

After a study of the subject the Supreme Court Committee drafted a proposed plan of government. A public hearing was then held on January 22, 1944. Representatives of all the interested bar associations appeared. The tentative plan was discussed and suggestions made and an amended plan drafted, which was then submitted to the committees of all the associations in the state who were studying the matter. More changes were proposed and incorporated and a final draft arrived at, a copy of which was then sent to every lawyer in the state together with a ballot whereby the lawyer voted "yes" or "no" on whether he favored integration, "yes" or "no" on whether he favored the proposed plan and, finally, made any additional suggestions. These ballots went out to 5886 Missouri lawyers. There were 2294 votes cast, the vote being over 6 to 1 in favor of integration. The ballots from men in the armed forces (156 in all) were kept separate and the vote favoring integration from that group was 12 to 1.

It was clear from the result of the vote that the Missouri lawyers wanted integration, whereupon the court entered its order of June 16, 1944 adopting the plan as submitted by the committee after making some additional changes resulting from suggestions received in the balloting.

It has been ordered by the court that nominating petitions for the first Board of Governors be filed on or before August 5, 1944 and the vote be taken and the ballots canvassed by September 15, 1944.

Integration in Missouri is now a reality. The new organization will begin to function September 30, 1944. The integration of the Missouri Bar was not the result of a long and bitter struggle. The matters which usually cause controversy in other jurisdictions — admission and discipline—were not involved. The Missouri success is directly due to the work of the organized groups of lawyers in Missouri. The plan adopted is the product of the combined effort of these groups. All differences were ironed out before the plan was submitted to the bar of the state for a vote. An educational campaign took the matter to many local groups throughout the state. Many of these groups, after having the matter explained, went on record as favoring integration. All of the committees working on the subject were aided materially by the factual data collected over the years by the American Judicature Society.

With this favorable background all of the members of the bar of Missouri who participated in the activity leading to the adoption of the new rule are looking forward with high hopes to the establishment of a vigorous and useful oragnization which will be of great benefit to the bar, the courts and the public in the years to come.

The Judicial Article of the Proposed Missouri Constitution

RICHARD S. RIGHTER

A CONSTITUTIONAL CONVENTION is now in session in Missouri and is in the process of making a rather complete revision of the constitution of 1875. The Committee on the Judicial Department entirely rewrote the judiciary article. It reduced the 68 sections in Article VI in the 1875 Constitution to 30. It shortened the article by about one-half. Without changing the essential structure of the Missouri courts, which on the whole have functioned satisfactorily, the committee endeavored to make improvements reflecting the best contemporary thought in the field of judicial administration. The purpose of this article is to give in the smallest space possible the principal changes incorporating these improvements. The convention has adopted the committee's report on first reading.

A short description of the Missouri courts will be necessary.

The Missouri judicial system now consists of five classes of courts: The supreme court, three courts of appeals, circuit courts, probate courts, and the justices of the peace. The supreme court has general superintending control over all other courts and appellate jurisdiction of criminal actions involving felonies, civil actions involving more than $7500.00, cases involving the state or federal constitutions, laws of the United States, revenue laws of the state, civil cases to which the state or a subdivision thereof or an officer of the state is a party, and cases in which the title to real estate is involved. The courts of appeals have appellate jurisdiction in all other cases.

The circuit courts are of general jurisdiction. Probate courts are confined to administration of estates, the appointment of guardians and curators of minors and persons of unsound mind.

The justices of the peace are, generally speaking, small debtors courts but have exclusive jurisdiction in such cases as unlawful detainer and suits for rent and possession.

Editor's Note: Mr. Righter is a member of the Kansas City bar, and chairman of the Committee on the Judicial Department of the Missouri Constitutional Convention.

The supreme court consists of seven judges and six commissioners and normally sits in two divisions, one of four judges and one of three. Three commissioners sit with each division and hear argument and write opinions but do not vote in the decisions of cases. They have no constitutional status.

The state is divided into three districts, in each of which sits a court of appeals consisting of three judges, and in the case of the St. Louis and Kansas City Courts of Appeals, two commissioners.

The state is divided into 38 circuits consisting in most instances of several counties. In the larger centers of population, as in Kansas City, St. Louis, St. Joseph and Springfield, the circuits consist of a single county with several circuit judges.

The Committee on the Judicial Department after careful study of our whole system of courts found the principal defects to be the following (not necessarily, however, in the order of their importance):

(1) The whole system lacks flexibility. It is not possible to transfer any judge from his own jurisdiction to any other except in the single case where a circuit judge who is to be absent may request another circuit judge to sit in his place, or disqualifies himself in a criminal case. The Convention cured this defect by adopting the following section:

"The Supreme Court may make temporary transfers of judicial personnel from one court to another as the administration of justice requires, and may establish rules with respect thereto."

This short sentence transforms the system from one of the utmost rigidity to one of the utmost flexibility. The object is to minimize the law's delays and see that the judicial power is available where it is needed. The word "personnel" was used so that commissioners might also be transferred without giving them constitutional recognition, since the commissioner system is recognized in Missouri as a temporary expedient.

The new article also provides that "any circuit judge may sit in any other circuit at the

request of the judge thereof." Again the language is broad. A judge may sit in the absence of another judge or simultaneously as a second division or may sit with him in general term if a case of importance makes this desirable.

At present the Missouri supreme court must sit in two divisions (except in cases sent by a division to the court in banc), Division One of four judges and Division Two of three judges. A judge is selected not only for the court but for the division and continues to sit in his particular division so long as he remains on the court. The rigidity of this arrangement has serious defects. The convention changed the entire system by providing:

"The supreme court may sit in banc or in divisions and courts of appeals may sit in divisions, as the courts may from time to time determine. Each division shall be composed of not less than three judges, at least one of whom shall be a regular judge of the court."

If the work of the supreme court made it necessary three divisions could be formed temporarily by calling in other judges. By permitting judges to sit in any division it was thought that an increased sense of unity would result.

It will be noted that the courts of appeals may sit in more than one division. By this device if for example the St. Louis Court of Appeals were behind with its docket three additional judges could be temporarily assigned to the court to help bring it up to date. The court would then sit in two divisions of three judges each.

By these means the courts are made responsive to the demands of legal business and a minimum number of judges can discharge a maximum volume of work.

(2) While the present constitution provided that the Supreme Court had superintending control over all other courts the court did not in fact exercise such control. This shortcoming was corrected in two ways:

(a) A section was adopted expressly conferring upon the court the power to make rules of practice and procedure. As adopted by the convention the section was probably hedged about with too many safe-guards, but the essential power is there. It reads as follows:

"The Supreme Court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights, or affect the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended by a law limited to the purpose."

(b) The power of review of decisions of the courts of appeals by certiorari which by judicial interpretation had been limited to cases where there was a conflict between the ruling of the court of appeals and a prior ruling of the supreme court, was broadened so that it resembles the scope of review under this writ by the United States supreme court of the rulings of the circuit courts of appeals.

The new section provides the case *shall* be transferred from a court of appeals to the Supreme Court when any member of the court of appeals dissents on the ground that the opinion is contrary to any previous decision of the supreme court or any of the courts of appeals, and *may* after opinion be so transferred by order either of the supreme court or of the court of appeals: (1) because of the general interest or importance of a question involved, or (2) for the purpose of reexamining the existing law, or (3) pursuant to supreme court rule. The new section provides that the supreme court may finally determine all such cases. This should eliminate the old practice in Missouri, where an opinion was quashed upon certiorari, of remanding the case to the court of appeals for a new opinion not inconsistent with the supreme court's ruling.

(3) A system of magistrate courts was set up to replace the justices of the peace. Under the present constitution the justices are not required to be lawyers and no limitation is placed upon the number that may be created by statute. The evils of the system are many, and well recognized. We found that there were 14 commissioned justices of the peace in one small county which could not normally support one full-time justice. The salient features of the magistrate courts are as follows:

(a) In counties of less than 30,000 population the probate judge shall act as magistrate; in counties of more than 30,000 and not more than 70,000 inhabitants there shall be one full-time magistrate; in counties of more than 70,000 and less than 100,000 inhabitants there shall be two magistrates; in counties of 100,000 inhabitants or more there shall be two

magistrates and one additional magistrate for each additional 100,000 inhabitants or major fractions thereof. In order not unduly to limit the number it was provided that the circuit courts shall have power according to the needs of justice to increase the number in any county by not more than two and the court may decrease the increased number by a similar order.

(b) All probate judges except incumbents must be licensed attorneys and all magistrates except present justices of the peace or those who have held the office for four years must also be attorneys.

(c) Each magistrate's jurisdiction is coextensive with the county and where a county has more than one they may organize into a court or courts with divisions. This is particularly desirable in populous counties having large cities where the magistrate court may sit in one place and the cases be assigned in rotation to the various members of the court, thus distributing the work equally.

While a county having more than one magistrate must be divided into districts and each magistrate elected from a district it is not required that he be a resident of that district. In large cities where most of the lawyers reside in one or two residential areas the requirement that the magistrate be a resident of his district would greatly limit the field of selection.

(d) In counties of less than 70,000 inhabitants magistrate courts will have concurrent juvenile jurisdiction with the circuit courts and will have the powers of the circuit judge in chambers when the circuit judge is absent from the county. This reform is needed in circuits consisting of more than one county, where a circuit judge often is unavailable to issue emergency writs.

Magistrates will have the same jurisdiction as justices of the peace until otherwise provided by law.

(4) It was found that there are over sixty boards, bureaus and administrative agencies in the state having quasi-judicial powers and that the general assembly has in some instances provided no means of judicial review and in others a limited one. It appeared highly desirable that a reasonable provision for the review of administrative rulings applicable to all administrative agencies be provided in the constitution as a protection to the citizens. After many hearings before the committee and much debate in the convention the following section was adopted:

"All final decisions, findings, rules and orders of any administrative officer or body now or hereafter existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether (1) the same are authorized by law, and (2) in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record."

There was a considerable body of opinion that the court ought to be required to review the weight of the evidence but the majority thought that such a requirement would impair the functioning of the agencies.

(5) The fee system was abolished entirely in all courts. Heretofore most justices of the peace have subsisted on fees and probate courts have been paid through a combination of fees and salaries.

(6) It was provided that except for the incumbents no appellate judge shall continue to hold office after attaining 75 years of age. This age limitation was discussed at some length in the committee. An effort was made to secure the adoption of a pension system permitting a judge to retire on half pay at the age of 65 and remain available for further service. The proposal was rejected by the committee and was not presented to the convention where it would not have passed.

(7) Heretofore Missouri has lacked a practical method of removing an incapacitated judge. The old constitution permits his removal by the general assembly after a hearing. It does not appear that this remedy has ever been resorted to. The convention adopted the following section to remedy this deficiency:

"Any judge of a court of record or magistrate who is unable to discharge the duties of his office with efficiency by reason of continued sickness or physical or mental infirmity shall be retired from the office by order of a committee composed of three judges of the supreme court, one judge of each of the courts of appeals, and three circuit judges, elected by the judges of the respective courts, after notice and a fair hearing and on a finding of two-thirds of the committee that the disability is permanent. The judge so retired shall receive one-half his regular compensation until the end of his term of office. The supreme court shall prescribe rules of procedure under this section."

So far as the writer is aware, this provision is unique. While the committee did not recommend and the convention did not adopt any provision for a judicial council, it can readily be seen that the committee provided for in this section if authorized by the supreme court, which now has ample power to do so, could very well perform some of the functions of a judicial council.

The present mode of selecting judges in Missouri, known as the "Missouri Non-Partisan Court Plan," was retained without charge. Its features have already been fully explained in the pages of the JOURNAL.

As is self-apparent, the principal object of the new judicial article was to secure a flexible, unified system of courts under a directing head with uniformity in its decisions and the ability to render prompt justice. Whether these results accrue will depend in large measure upon the intelligence and imagination with which the Missouri supreme court administers the system. There is every reason for confidence that the court will live up to its responsibility.

While the convention has adopted the report of the committee on first reading all of the sections must secure a majority vote of the convention on third reading. There is ground for believing that no substantial change will occur on final hearing, although strong opposition to the non-partisan court plan was present in the Convention.

What Will Integration Do for the Massachusetts Bar?

In his address as retiring president of the Massachusetts Bar Association at its annual meeting June 10, 1944, the Honorable Mayo A. Shattuck made the following excellent statement of benefits to be expected from integration of the Massachusetts bar (quoted from the Boston Bar Bulletin, 15:152, July, 1944):

"1. *It can hardly fail to lead to an improvement in the administration of justice.* Integration of the bar in other states has proved that the tasks of research and other public duties, which are now entrusted to scattered and non-coordinated lawyers or groups of lawyers, can be performed more thoroughly and efficiently by a single organization comprised of the entire bar of the state.

"2. *It can hardly fail to lead to a closer relationship with the judiciary.* Through integration lawyers would become in fact as well as in theory a part of the judicial branch of the government. This must necessarily lead to greater power and facilities with which to translate into actual accomplishment the ideas and objectives of a united bar.

"3. *It can hardly fail to improve the technique of examination and admission and the justice and thoroughness of bar discipline.* An integrated bar, properly organized and financed, has proved to be of great assistance to the high courts of other states in these important branches of bar supervision.

"4. *It can hardly fail to produce a closer relationship with the state legislature.* A unified bar can study, draft and present to the General Court proposed legislation to cure existing defects and deficiencies in our laws, and can give to the legislature or the judicial council, whenever requested, considered opinions on suggested legislation.

"5. *It can hardly fail to improve and expand services to its own members.* The heart of effective organization work is always unity; the sinews of the body corporate are, of course, its finance. We have in modest fashion maintained a central office supervised by a full-time secretary, but we are still remiss in the dissemination of information relating to laws, regulations and bar association affairs, and we are merely stumbling along in the strengthening of safeguards against the practice of law by untrained persons.

"6. *It can hardly fail to bring about a greater contribution to the public welfare.* Members of our profession have done an impressive job in this national emergency. They have assisted draft and appeal boards; they have aided men in the military services; they have guarded civil liberties and have maintained legal clinics for the poor; they have staffed committees on public safety to a remarkable extent. The trouble is that the general public has no way to know of these unselfish contributions, and, once again, that these services are sporadic and unofficial in nature. It goes without saying that we could do much more, and obtain much more of the credit justly due us, if we were unified. It could hardly remain true under integration that lawyers would be put at the bottom of the public's listing of essential occupations and professions."

The National Program of State Traffic Court Conferences

JAMES P. ECONOMOS

"THE ANNUAL TOLL of well over 30,000 persons killed, of 1,250,000 people crippled, maimed or otherwise injured, and of more than $1,500,000,000 in direct economic losses from traffic accidents spells untold human misery and suffering and a terrible waste of national resources both in men and materials. Boiled down, these figures mean an injury every 25 seconds, a death every 18 minutes, and a cost of $170,000 every hour, day and night, from automobile accidents."

The foregoing sentences from the opening paragraph of the recent book *Traffic Courts* by George Warren,[1] present a graphic picture of a situation that is of growing concern not only to highway and law enforcement officers but to all those who bear any part of the responsibility for traffic safety. Every year of war renders the crisis more acute, for no new automobiles are being produced, and the old ones become more and more dangerous to run.

Because every traffic violation is either actually or potentially a court case, and because traffic cases greatly outnumber all other types of cases on the nation's court dockets, the courts and the legal profession have a very large part of the responsibility for reducing the tragic toll of life and property in traffic accidents. In recognition of this responsibility, the National Conference of Judicial Councils joined with the International Association of Chiefs of Police about six years ago to create the National Committee on Traffic Law Enforcement, of which the Honorable Arthur T. Vanderbilt of Newark, N. J., is chairman.

This organization plunged at once into a nation-wide study of traffic courts, being financed by funds from the Automotive Safety Foundation, and the results of that study were embodied in the book *Traffic Courts* just mentioned. Many a project has ended with the publication of a book, but that was just the beginning in this case. As the work became known other organizations, and especially the Junior Bar Conference of the American Bar Association, took part in it.

JUNIOR BAR CONFERENCE TAKES A HAND

The Junior Bar Conference had long been interested in the problems involved in the traffic court study. Its Committee on Aid to the Small Litigant was instrumental in making a nation-wide study of the justice of the peace system, the results of which are soon to be published by the Judicial Council of Michigan. In 1940 it considered and approved the fifty-seven recommendations of the Warren book regarding traffic court organization, administration and procedure. Last year, with the aid of a grant from the National Safety Council, its Committee on Traffic Courts[2] entered into a joint program with a similar committee of the Council to secure the cooperation of state and local bar associations and other interested groups in sponsoring a series of state-wide traffic court conferences. The chairman of the Junior Bar Conference has served as full-time secretary to the committee for the purpose of carrying on this work.

So far, traffic court conferences have been held in twenty-five states, as shown on the accompanying map. Plans are under way for ten more, as there shown, and still others will follow.

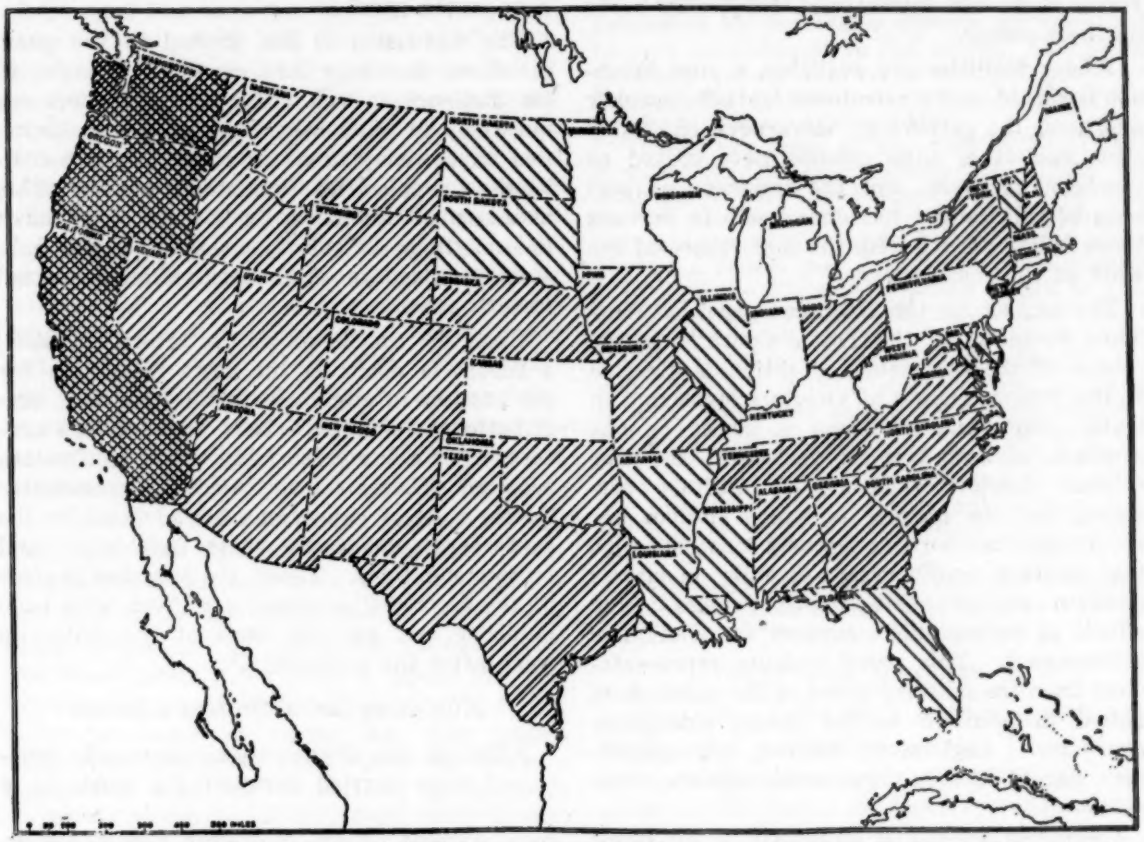
The conferences are attended by judges having jurisdiction over violations of traffic laws, prosecutors assigned thereto, clerks of traffic violations bureaus under court supervision, justices of the peace, mayors and city councilmen, state legislators, county, district and state's attorneys, city chiefs of police and their traf-

Editor's Note: Mr. Economos is chairman of the Junior Bar Conference of the American Bar Association and secretary of its Traffic Court Committee. Although his own part in the work is stated somewhat obscurely in the article, Mr. Economos has been one of the chief organizers of the traffic courts conferences and is largely responsible for their success. The distinguished list of co-sponsors, luncheon speakers and general chairmen was built up chiefly through his efforts, and he has regularly served as leader of the afternoon panel discussions.

1. Reviewed in this JOURNAL last August (27 J. Am. Jud. Soc. 60). Its final chapter "A Proposed Traffic Court System" was reprinted last month (28 J. Am. Jud. Soc. 25).

2. The Traffic Court Committee is composed of Robert D. Morrison, Lynchburg, Va., Chairman; James P. Economos, Chicago, secretary; Lt. (j. g.) Charles Henning Burton, Washington; Richard Carpenter, Sacramento; Joe Brown Cummings, Nashville; Clifford E. Enger, Austin, Minn.; Fred E. Inbau, Chicago; Hertzel H. E. Plaine, Washington; Adrian M. Unger, Washington; William McFarlin, Des Moines, and Charles S. Rhyne, Council adviser, Washington.

STATE-WIDE TRAFFIC COURT CONFERENCES



The three cross-hatched states have held their second annual traffic court conferences. The first conference has been held in each of the large group of dark shaded states. Definite plans are in progress for conferences in the ten light-shaded states, which include Rhode Island.

fic personnel, sheriffs and their deputies, state highway patrols, motor vehicle administrators, members of departments of public safety, and others concerned with the problems of traffic safety.

THE TYPICAL CONFERENCE PROGRAM

Conferences last only one day, with morning and afternoon sessions. The typical conference opens with an address of welcome followed by an address, "The National Program for Improving Traffic Courts." This is usually presented by Mr. Norman Damon, vice-president of the Automotive Safety Foundation, and in it he tells the story of the National Committee on Traffic Law Enforcement, the traffic court study and Mr. Warren's book. He calls attention to the recommendations in the book and their appropriateness for immediate adoption in wartime.

The remainder of the morning program is devoted to a panel discussion on "Improvements in the Administration of Courts Handling Traffic Cases." Harvey D. Booth, secretary of the Traffic Court Committee of the National Safety Council, and a member of the Committee on Improvements in Traffic Courts of the Section of Judicial Administration of the American Bar Association, has frequently served as panel leader on this subject. In the discussion, attention is directed to the qualifications of the traffic judge, organization of the court, physical condition and facilities of the courtroom, the function of the prosecutor in the traffic court, and uniformity of fines and penalties. A typical panel for this discussion would include a metropolitan judge and prosecutor, a rural judge and prosecutor, representatives from the state highway patrol, the traffic division of a city police department, and the motor vehicle administrator's office. Offi-

cers of bar associations and representatives of traffic court committees also frequently serve on these panels.

Where facilities are available, a noon luncheon is served, and a prominent luncheon speaker addresses the gathering. Governors, chief justices and other high officials have served as luncheon speakers, and the influence of persons of this calibre has done much to impress those in attendance with the importance of the work of the conference.[3]

The subject for the afternoon panel is "War-Time Problems of the Traffic Court." In the course of the discussion, attention is directed to the various classes of violators appearing in traffic court, and emphasis is placed on the problem of how best to deal with the war worker violator; violations by military personnel and the manner in which civilian law enforcement authorities can best cooperate with the military authorities; juvenile violators; drunken drivers; "hit-and-run drivers"; and efforts to secure public support for traffic law enforcement. This panel includes representatives from the military police or the naval shore patrol in addition to the others previously mentioned. Legislators, mayors, city councilmen, parent-teacher organization officers, automobile club representatives, and others appear on the panel.

The discussion is not limited to the panel members, but may and usually does take in the audience as well. The panel members ask questions of each other and of the audience, and anyone may break in at any time to challenge or supplement any statement made. This arrangement induces a lively discussion, and it is sometimes difficult to cover all of the subjects assigned in the ninety minutes allotted to each panel.

Upon the conclusion of the afternoon panel, a report is made on the day's discussion for the purpose of summing up the important contributions which have been made in the conference, and summarizing the conclusions reached. Thereafter the resolutions committee drafts a set of resolutions for adoption by the conference, embodying those conclusions and recommendations. These, the tangible product of the day's deliberations, are given wide local publicity and are the basis of the follow-up work after the conference.[4]

NUMEROUS LOCAL SPONSORS ASSIST

Although the organizations previously mentioned have carried forward the work on a

3. Luncheon speakers at conferences so far include the Honorable John C. Young, chief justice of the Colorado Supreme court; Honorable Herbert B. Maw, governor of Utah; Honorable Lucien D. Gardner, chief justice of the Alabama Supreme Court; Honorable Samuel R. Watt, solicitor, Seventh Circuit of South Carolina; Honorable J. Early Craig, Arizona member of the House of Delegates of the American Bar Association; Honorable John J. Gutknecht, judge of the Municipal Court of Chicago; Honorable Robert S. Kerr, governor of Oklahoma; Honorable Emery B. Denny, associate justice of the Supreme Court of North Carolina; Honorable Floyd E. Anderson, New York state senator; Honorable Grafton Green, chief justice of the Supreme Court of Tennessee; and the Honorable Waymon B. McLeskey, president of the Ohio State Bar Association.

4. Resolutions adopted at the Arizona conference, April 27, 1944, called for a permanent committee to continue the campaign; certain, consistent and sufficiently severe punishment for traffic offenses; uniform enforcement of traffic laws; elimination of ticket fixing; renewed emphasis on the wartime speed limit; cooperation between civil and military authorities in cases involving military personnel; cooperation among police, prosecutors and judges; adequate courtroom facilities; and uniformity of fines and penalties.

5. Co-sponsors thus far include the state bar associations of California, Oregon, Colorado, Utah, Georgia, Alabama, South Carolina, Nebraska, Arizona, Texas, Oklahoma, North Carolina, New York, Virginia, Tennessee, Missouri, Ohio, Iowa and Montana, as well as the local bar associations of Los Angeles, San Francisco, Alameda County, Multnomah County, Denver, Atlanta, Birmingham, Richland County, South Carolina, Omaha and Lincoln, Maricopa County, Ariz., Dallas, Fort Worth and Houston, Tulsa and Oklahoma County, Greensboro and High Point and Wake, Durham, Forsyth and Mecklenburg Counties, N. C., Onondaga County, N. Y., Kansas City and Columbus, and the following other legal organizations: Barristers' Club of San Francisco, Lawyers' Club of Alameda County, Law Club of Denver, Lawyers' Club of Atlanta and Lawyers' Association of Kansas City.

6. American Automobile Association (several times), Automobile Associations of Alabama, Arizona and Ohio; Motor Clubs of Iowa, Carolina and Winston-Salem; American Association of Motor Vehicle Administrators; American Transit Association and American Trucking Associations, Inc.; and local truck owners' associations of North Carolina and Oklahoma.

7. Colorado, Georgia, Alabama, South Carolina, Nebraska, Texas, North Carolina, New York and Tennessee.

8. Denver, Birmingham, Lincoln, Omaha, Arizona, New York State (junior) Syracuse (both senior and junior), and Tennessee.

9. Safety Councils of Oakland, Seattle, Utah, Oklahoma, Iowa, Richmond, Tennessee, Ohio, Cleveland, Dayton, Columbus, Los Angeles and Omaha, and similar organizations with different names in Berkeley, Portland, Oregon, Colorado, Georgia, Texas, Oklahoma, and North Carolina.

10. Sheriffs' and Peace Officers' Associations of Los Angeles, Colorado, Alabama, South Carolina, Nebraska, Texas, Oklahoma, North Carolina, New York, Ten-

nation-wide scale, the success of the individual conferences has been due in each case to generous local support. All but two of the conferences thus far held have been sponsored by the state bar association and from one to six local and district bar associations.[5] Thirteen national, state and local automobile clubs have appeared as co-sponsors,[6] as well as nine state municipal leagues,[7] nine chambers of commerce and safety divisions thereof,[8] twenty safety councils and traffic safety organizations,[9] thirty-three police and peace officer organizations,[10] twenty-four state governmental departments and bureaus,[11] and twenty-eight other organizations,[12] including American Legion clubs, manufacturers' associations, parent-teachers associations, and others. The general chairmen have been men of the highest public rank.[13]

It is only natural that conferences so well supported and attended should attract favorable public notice and bring about prompt improvements in the conditions to which they draw attention. The following editorial from the Birmingham *Age-Herald* is typical of newspaper comment on the meetings:

"Enforcement of traffic law only begins when the motorcycle officer pulls up beside a speeder or a reckless driver and hands him a summons to court. Enforcement must be carried into the courts before it is effective.

"Moreover, just as there can be poor enforcement by the traffic officers, so there can be poor enforcement in the courts. The cause of traffic safety can be harmed as much by the maladministration of justice in the traffic courts as it can anywhere else.

"Those are some of the reasons why there is being held in Birmingham this Friday the Alabama Traffic Courts Conference. The conference has the support of leading lawyers, law enforcement officials and citizens of the state. No less a person than Lucien D. Gardner, chief justice of the Alabama Supreme Court, is honorary chairman of the conference and will speak at one of its sessions.

"The traffic court situation in Alabama has many flaws. It has been subject to many abuses. There has been a deplorable, almost a criminal, lack of uniformity in traffic court disposition of cases. Some minor traffic courts, it is charged, impose unjustly heavy penalties for infractions that another minor court only a few miles away would dismiss with a warning.

"A conference seeking to improve this situation should benefit not only lawyers and the judiciary but the general public."

WHAT GOOD DO THEY DO?

Examples of the good accomplished by the traffic court conferences and the follow-up efforts of local sponsors are legion. The day after the Nebraska conference, Judge Dennis

nessee, Ohio and Iowa; Highway Patrols of Colorado, Arizona, North Carolina, Oklahoma, Tennessee, Ohio and Iowa; and police organizations of South Carolina, Texas, Oklahoma, North Carolina, New York, Virginia, Ohio and Iowa.

11. Colorado Motor Vehicle Bureau and Highway Traffic Advisory Committee; Alabama Department of Public Safety, Drivers' License Division, and Division of Safety and Inspection of Industrial Relations Department; South Carolina State Highway Department, Law Enforcement Division, and Highway Traffic Advisory Committee; Omaha Department of Police and Public Safety and Nebraska Department of Roads and Irrigation, Motor Vehicle Division; Texas Department of Public Safety; Oklahoma Traffic Advisory Committee, Department of Motor Vehicle Registration, Department of Public Safety and State Highway Commission; North Carolina Department of Motor Vehicles; Virginia Division of Motor Vehicles; Tennessee Traffic Advisory Committee; Ohio Department of Highways; Iowa Department of Public Safety; and New York State Motor Vehicle Bureau.

12. Industrial Commissions of North and South Carolina and Virginia; American Legion Departments of Nebraska and Oklahoma; Traffic Commissions of Nashville, Memphis, Chattanooga, Knoxville and Dallas; City of Lincoln Department of Public Welfare and Safety; Oklahoma Press Association, Corporation Commission, Department of Public Instruction, Education Association and Congress of Parents and Teachers; North Carolina Institute of Government and State Bureau of Investigation; American Society of Safety Engineers, Central New York Chapter; New York Department of Law; Virginia Manufacturers' Association; Automobile Safety Foundation; Institute of Traffic Engineers; National Conservation Bureau; and Iowa Board of Supervisors Association.

13. William C. Mathes, president, Los Angeles Bar Association; Scott C. Lambert, president, Barristers' Club of San Francisco; Ray Carr, chairman, Portland Traffic Safety Commission; Kenneth B. Colman, vice-president, Seattle Safety Council; Honorable Orie L. Phillips, judge of the United States Circuit Court of Appeals, Denver; Grover A. Giles, attorney-general of Utah; C. A. Williams, director, Georgia Department of Public Safety; William Logan Martin, Alabama, member of Board of Governors of American Bar Association; Ransome J. Williams, Lieutenant-Governor of South Carolina; George L. DeLacy, president, Nebraska State Bar Association; J. Early Craig, Arizona member of House of Delegates of American Bar Association; Honorable James P. Alexander, chief justice, Supreme Court of Texas; Honorable Earl Welch, justice, Oklahoma Supreme Court; Willis Smith, North Carolina, member of Board of Governors of American Bar Association; Honorable Nathaniel L. Goldstein, attorney-general, state of New York; Honorable W. Clyde Dennis, trial justice, Buchanan County, Virginia; Honorable Roy A. Miles, judge of traffic court, Nashville, Tenn., Honorable Allen W. Frost, judge of traffic court, Kansas City, Missouri; Honorable Carl V. Weygandt, chief justice, Supreme Court of Ohio; Honorable Frederic M. Miller, justice, Supreme Court of Iowa and vice-president, Iowa State Bar Association.

E. O'Brien reported that the Municipal Court of Omaha completely revised its procedure in traffic cases and made extensive alterations in the physical set-up of the courtroom. The Washington conference was responsible for action taken in Seattle to segregate traffic violators from drunks, prostitutes, petty thieves and the like at trial. Today traffic cases are tried in a new and separate courtroom, and—a small but important detail—the large cash register that used to frown ominously on all defendants has been removed to a clerk's office. Portland, Oregon, boasts a fine new traffic court as a result of interest generated by the participation of city officials and bar leaders in the Oregon Traffic Courts Conference. The most important result, however, has been the improvement in the handling of traffic cases by the hundreds of individual judges who have acquired through attendance at the conferences a better understanding and more intelligent approach to the problem of their work.

Prospects are exceedingly bright for a continuation of the traffic court improvement program indefinitely. Every conference so far has voted to make it a yearly affair, and three west-coast states have already held their second annual traffic court conference. More than three hundred Colorado judges, prosecutors and other officials have participated in thirteen regional meetings conducted by the Colorado Bar Association to follow up the Colorado Traffic Courts Conference. Other states are planning to follow Colorado's lead in this respect. The program will be further boosted by the recent decision of the Section of Judicial Administration of the American Bar Association to join with the Junior Bar Conference and other organizations as a general co-sponsor. Many members of the American Bar Association Special Committee on Improving the Administration of Justice have not only supported the traffic court conferences, but have taken the opportunity to acquaint the participants with the organized bar's general program of improving the courts, of which the traffic court program is a single though important part.

With the continued cooperation of those who have already carried the movement so far, and especially with the further aid of the bench and bar, great improvement may be expected in the nation's traffic courts in the next few years.

Judicial Conferences Make Better Judges

The general organization of the American judiciary is such as to isolate individual judges from their neighbors and to hinder the development of a group feeling among them. The Administrative Office of the United States Courts has done much to bring the federal judges together, and a high degree of judicial unity has been achieved in the state courts of certain metropolitan cities, but in the country districts, both state and federal, the judge reigns in more or less solitary grandeur within the territorial limits of his jurisdiction.

True integration of the judiciary, for which the American Judicature Society has campaigned for thirty years, involves central business management, abolition of jurisdictional barriers, and other features that cannot be brought about except by constitutional amendment. There is nothing in any constitution, however, that prohibits judges from getting acquainted with each other, exchanging ideas and comparing notes, not only on how the fish are biting in their respective territories, but also on the best ways to deal with common problems in their work.

Two judicial conferences held within a week of each other during the month of June gave excellent demonstrations of the beneficial results of such person-to-person contact among judges. The first was the Missouri Judicial Conference, held June 16 and 17 in Jefferson City. JOURNAL readers will recall the story published a year ago (27 J. Am. Jud. Soc. 57) of the creation of the Missouri Judicial Conference by act of the state legislature. Missouri judges had been having a meeting once a year for many years, informally and at their own expense. The Judicial Conference Act made the conference a legal body, made it the duty of every Missouri judge to attend, and provided for the payment of their expenses from state funds. Unfortunately, the appropriation bill to cover their expenses did not

get through, and so there was no money to pay them this year. Nevertheless, fifty-nine judges were present—the largest gathering of judges in the history of the state, and nearly three quarters of the total number.

A new civil code modeled after the federal rules is to go into effect next January in Missouri. State judges, many of whom have not practiced law since the new federal rules were adopted and are now constantly immersed in the trial of state cases, are apt to know less about federal procedure than the lawyers before them, most of whom practice regularly in both state and federal courts. The conference program was therefore appropriately devoted in the main to an institute on the new civil code. Certain judges and lawyers, prepared in advance, explained one feature after another of the new rules and then led a general discussion of them. When they came to the pre-trial rule, five St. Louis judges gave a demonstration of pre-trial procedure. Based on actual cases taken from the reports, their "script" included every feature of a typical pre-trial conference, not forgetting a certain amount of good-natured banter to emphasize the friendly spirit without which the conferences cannot succeed.

At luncheon in the Missouri Hotel, and at the "speech-less" barbecue dinner at the Jefferson City Country Club, judges got together in groups of three and four to exchange views on the progress of the war, tell about interesting cases on their dockets, and argue state and national politics. A casual listener would frequently hear such phrases as: "By the way, what are you doing over in your circuit about ————?" "Have you been having any trouble with ————?" "If ———— ever happens in my court again, I've decided what I'm going to do about it."

The best Missouri judge, whoever he may be, went home from the Missouri Judicial Conference having, probably without knowing it, inspired his colleagues of the bench to be better judges. The poorest Missouri judge, whoever he may be, went home with a better conception of what it means to be a judge and of the mental attitudes and some of the methods of the good judges. All of them went home better prepared to hold court under the new rules, and stimulated to do a better job than before.

Three days later the Judicial Conference of the Fourth Federal Circuit opened at Asheville, N. C., for a three-day session. This was a replica of the Missouri conference on a larger scale. The Fourth Circuit conference, in fact, is the grand-daddy of all the judicial conferences, having been initiated by Senior Circuit Judge John J. Parker some fourteen years ago. Held in a beautiful resort hotel in the delightful Smoky Mountain region, it has even been alleged, as Judge Parker smilingly admitted at the annual dinner, that the success of the conferences has been due more to the location than to the program. That notion, Judge Parker, declared, was dispelled a year ago when the Grove Park Inn was not available and the conference was held downtown, and was still "the biggest and best we ever had."

This year's conference was even bigger and better. Only one of the judges was absent, because of sickness. All day Tuesday, June 20, the judges met in closed session, with Chief Justice Harlan F. Stone, the Fourth Circuit Justice, taking his turn in the chair, and one by one they stood up and reported on conditions in their districts and whatever else was on their minds. Your reporter, present by invitation, was disappointed not to hear at least one judge confess that things were going badly and ask for advice and assistance, but was not surprised at the uniform reports of dockets up to date and everything running smoothly.

That is not to say, however, that there was no interchange of ideas and suggestions. One judge remarked that in wartime admission to American citizenship is a greater privilege than ever before and the admission ceremony ought to be made as impressive as possible. Thereupon a half dozen or more judges described what they had done in the way of citizenship ceremonies. One had enlisted the civic organizations of the city and they had presented American flags to the new citizens. Others had other methods to describe, and it is not unlikely that some of the judges present at that meeting have since made improvements in their own citizenship exercises.

At the conclusion of the judges' reports, the Honorable Joseph W. Sanford, warden of Atlanta Penitentiary, addressed the group on the relationship of the court and the institution. So keen was the interest and so fre-

quent the interruptions that the chairman was finally compelled to ask that further discussion be postponed until the end of the address. Mr. Sanford has given the JOURNAL a copy of his manuscript, and we hope to make available to our readers his numerous practical suggestions for beneficial cooperation between the sentencing judge and the prison authorities.

The opening of the public sessions of the conference was marked by a large crowd and distinguished speakers. The Regional Conference of United States Attorneys convened jointly with the Judicial Conference, and Mr. Howard M. Doyle of that group joined with Judge Parker in the address of welcome. There followed addresses by Chief Justice Stone, Attorney-General Francis Biddle, and the Honorable Manley O. Hudson, judge of the Permanent Court of International Justice.

The two remaining afternoon sessions were occupied with discussion of the second draft of the proposed federal rules of criminal procedure, with Lieutenant Commander James J. Robinson, reporter to the advisory committee, at the speaker's table to explain them and to answer questions. It was at the same conference a year ago that the first draft of the rules was first presented. In the Thursday morning session, Will Shafroth read his paper on pretrial procedure which is printed elsewhere in this issue, and he was followed by a general discussion of pre-trial and by reports of the chairmen of seven conference committees on selection of jurors, deferment of personnel and bankruptcy administration, law clerks for district judges, United States commissioners, salaries of personnel, review of Interstate Commerce Commission orders, and court reporters and habeas corpus.

Missouri is not the only state in which judges regularly hold meetings, nor is the Fourth Circuit the only federal circuit to hold judicial conferences. These two, however, are recent and shining examples of a practice that ought to be universal.

Letters to the Editor

More About Court Filing Methods

To the Editor:

In view of the discussion of filing systems in the October, December and February JOURNALS, some of the filing methods used in the office of the clerk of the United States District Court for the Eastern District of Michigan may be of interest both to lawyers and to clerks of offices having the custody of court records.

All persons having occasion to examine court files are aware of the time frequently consumed in locating a particular pleading or paper when the file contains a large number of such documents which are not found in chronological order and are badly confused. To obviate this difficulty, all pleadings and other papers filed in the cause are numbered consecutively in the order of filing. The number given to each paper is written in the docket before the entry referring to that paper, and the same number is written in the upper right hand corner of the first page of the paper itself. With the papers so numbered it is a simple matter to bring them into chronological order of filing and to determine whether any of the papers are missing.

In certain classes of cases, such as reorganization proceedings under the Bankruptcy Act and equity receiverships, the number of documents in the file frequently runs into several hundred. Thus, the receivership file of the First National Bank of Detroit contains approximately 10,000 pleadings and other papers. In such cases the files are made easily accessible by binding the various documents into packages of about 100.

For many years the flat system of filing has been used in this office, and until recently covers were required for all papers filed. The title of the cause was required to be endorsed on the back of the cover, and the filing stamp, which gives the day and hour of filing, was impressed below the endorsement. This made it necessary to turn papers over to ascertain the dates of filing. Now the filing stamp is impressed upon the first page of the paper itself, and attorneys are requested to discontinue the use of covers, which merely fill up space in the filing units.

These devices could be profitably adopted in any clerk's office handling a large volume of cases.

GEORGE M. READ, Clerk.

Detroit, Mich.

Separate Equity Courts

To the Editor:

The two letters commenting upon my article ["The Forsaken Laboratories of Judicial Science," 27 J. Am. Jud. Soc. 140, Feb. 1944.] would seem to stand together quite well.

Judge Clark's comment emphasizes the efficiency of the judicial process where law and equity are administered by a single court and complete relief can be had in one proceeding. The point which I tried to make is that separate equity courts, standing in opposition to strict law, would be of much value in enabling the judicial process to meet some needs which perforce must be satisfied by the administrative process. This does not mean nor did I suggest the thought that we might do away with administrative boards and agencies. The inadequacy of preventive equitable remedies, which I believe results principally from the absence of specialized equity courts, throws a burden on administrative tribunals which such equity courts might well bear in part at least. (Cf. the comments upon preventive equitable remedies of the courts in the Report of the Attorney General's Committee on Administrative Procedure).

I did not undertake to analyze and compare the quality of justice where law and equity have been merged, with the quality of judicial relief where the two systems were separated. That subject is merely mentioned in a footnote. When one looks to that matter, however, some types of inefficiency are to be found when the separate system has been maintained. Very often particular cases merely represent a mistake on the part of counsel in choosing the tribunal. Relief is to be had in one tribunal adequate for the complete disposition of the cause but counsel mistakenly applied to the wrong court. There are instances, it is true, where resort must be had to two courts for full relief. These situations are not very numerous and some might readily be cured by legislation. The technical demands of separate systems of law and equity are something with which the professional craftsman rather than the layman has to deal. At the worst the litigant meets with some delay and with some additional expense. But while the defects of the separate system relate to efficiency those of the merged system relate to the very substance—the quality of the equity and conscience which the litigant may hope to have applied. As long ago as 1905 Dean Pound, writing of *The Decadence of Equity* in 5 Columbia Law Review 20, although upholding the unified court, noted:

"* * * Examination of the current reports will disclose four tendencies in the amalgamated system: (1) legal rules superseding equitable rules in certain cases; (2) equitable rules, or portions of them, disappearing; (3) equitable principles becoming hard and fast and legal in their application; (4) equitable rules becoming adopted in such way as to confuse instead of supplement the legal rules. * * *"

Professor Walsh, while disagreeing with Dean Pound that equity was decadent, in an article written more than 30 years later, extolling the results of merger (22 Minnesota Law Review 479), conceded:

"* * * In the field of specific performance of contract the early vigor which was shown by the chancellor in the fifteenth century has not been conspicuous in modern developments. Some progress has been made by the Uniform Sales Act * * * but the courts have hindered rather than helped the development. * * *

"The refusal of many courts to permit a defaulting purchaser of land to recover payments made by him though they greatly exceed any damages resulting, and even though no damages arose from his breach, is a definite failure of the merged procedure to accomplish a result which equitable relief against forfeiture clearly demands."

In some states where merger has taken place specific performance of a contract is now granted to a vendor in an action at law, since the decree sought is merely one for the payment of money. The result has been a disappearance of much of the essential fairness which equity enforced in cases of this kind. Such a purely equitable defense as hardship or even unfairness without actual fraud, is not available in some of these jurisdictions. Much of the "conscience" enforced in equity is lost. (See e.g. 34 Mich. L. Rev. 545). In fact the chancery division of the unified English court has said that it is not a court of conscience.

This is not the first time in the history of Anglo-American jurisprudence when the administration of law and equity in one court was attempted. In the twelfth and thirteenth cen-

turies the common law courts administered equity. But by the fourteenth century, Professor Holdsworth has shown (26 Yale Law Journal 1), they had developed such a legalistic equity that the evaporation of equitable principles led to a separation through the rise and establishment of the English Court of Chancery.

LEONARD J. EMMERGLICK,
Newark, N. J.

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